Office-Supreme Court, U.S.
FILED
SEP 18 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO. 80-2189

MAJOR BECTON, STANLEY BECTON, ROBERT JONES, ROBERT POLLACK, VINCENT DAMION and BARRY MIROJNICK,
Petitioners

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITIONERS' REPLY TO MEMORANDUM IN OPPOSITION

GERALD H. GOLDSTEIN
GOLDSTEIN and GOLDSTEIN
29th Floor Tower Life Building
San Antonio, Texas 78205
Attorneys for Barry Mirojnick

DANIEL R. MARLOWE
428 13th Street, #1000
Oakland, California 94612
Attorneys for Major Becton and Stanley Becton

EDWARD A. MALLETT
J. PATRICK WISEMAN
NELSON & MALLETT
3303 Main, Suite 300
Houston, Texas 77002
Attorneys for Vincent Damion

RICHARD THORNTON
600 U.S. National Bank Building
Galveston, Texas 77550
Attorneys for Robert Pollack

ROBERT TURNER
DEBORAH GOTTLIEB
910 Houstson Bar Center
Houston, Texas 77002
Attorneys for Robert Jones

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

		Page
1.	Contrary To The Government's Assertion, The First Trial's Sufficiency Will Be Reviewed By The Fifth Circuit Even Though That Trial Resulted In A Mistrial After The Jury Hung.	1
2.	The Question Of Whether A Defendant Tried On Insufficient Evidence May Be Retried Is "Collateral" To The Issue Of Guilt, Regardless Whether That First Trial Resulted In Guilt, A Hung Jury, Or A Verdict Of Not Guilty.	3
3.	The Ruling Below Conflicts With Other Courts Of Appeals.	5
4.	The Government's Concern With Economy Is Constitutionally Misplaced And Factually Incorrect.	6
	Conclusion	8
	Certificate of Service	9

LIST OF AUTHORITIES

CASES

	Page
Abney v. U.S., 431 U.S. 651 (1977)	3, 4, 5, 7
Burks v. U.S., 437 U.S. 11	5, 6, 7
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541	3
U.S. v. Becton, (5th Cir. 1980) 632 F.2d 1294	2
U.S. v. Dunbar, (5th Cir. 1980) 611 F.2d 985, en banc	7
U.S. v. Jelsma (10th Cir. 1980) 630 F.2d 778	5, 6
U.S. v. Rey, (5th Cir. 1981) 641 F.2d 222	2
U.S. v. United States Gypsum Co. (3rd Cir. 1979) 600 F.2d 414	5, 6
U.S. v. Wilkinson, (5th Cir. 1979) 601 F.2d 791	2

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 29	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO. 80-2189

MAJOR BECTON, STANLEY BECTON, ROBERT JONES, ROBERT POLLACK, VINCENT DAMION and BARRY MIROJNICK,
Petitioners

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITIONERS' REPLY TO MEMORANDUM IN OPPOSITION

Come now the Petitioners, MAJOR BECTON, STANLEY BECTON, ROBERT JONES, ROBERT POLLACK, VINCENT DAMION and BARRY MIROJNICK, and file this Reply to the Government's Memorandum in Opposition to the Petition for Certiorari.

1. CONTRARY TO THE GOVERNMENT'S ASSERTION, THE FIRST TRIAL'S SUFFICIENCY WILL BE REVIEWED BY THE FIFTH CIRCUIT EVEN THOUGH THAT TRIAL RESULTED IN A MISTRIAL AFTER THE JURY HUNG.

In its opposition Memorandum, the Government states that "[I]n the mistrial setting . . . the sufficiency issue will

never arise before the Court of Appeals in conjunction with an appeal from a final judgment". Memorandum in Opposition at p. 5, n. 2 (emphasis added). That is not the law in the Fifth Circuit and Petitioners' dispute with the circuit opinion is not *whether* sufficiency will be tested on appeal but *when*: before or after a second trial.

In its opinion below, the Fifth Circuit expressly stated that although resulting in a mistrial, the sufficiency of the evidence adduced at Petitioners' first trial would be reviewed on appeal from any subsequent conviction, should one occur.

> "It should be borne in mind that we do not confront the issue of reviewability; *it is not an open question in this circuit that precisely this issue (sufficiency of the evidence at the first trial) is subject to review on appeal from a second conviction should one occur.*" (emphasis supplied) *U.S. v. Wilkinson,* (5th Cir. 1979) 601 F.2d 791.

U.S. v. Becton, (5th Cir. 1980) 632 F.2d 1294, 1296.

In *U.S. v. Wilkinson,* the Fifth Circuit made it unmistakably clear that the double jeopardy clause requires that a claim of evidentiary insufficiency at the original trial be reviewed by the appellate court upon appeal from a conviction at the subsequent trial. 601 F.2d at 794. Again, in *U.S. v. Rey,* (5th Cir. 1981) 641 F.2d 222, 225-26, the Fifth Circuit reiterated that:

> "[T]he claimed insufficiency of the evidence at [the] first trial is properly decided only on appeal after any conviction in [the] second trial."

More importantly, the Government avoids the central internal tension in these holdings of the Court of Appeals.

While recognizing that such review is, of necessity, premised upon the double jeopardy clause, the Court below refuses to allow an appeal of that claim prior to retrial, thereby depriving Petitioners of a remedy to cure the very harm the double jeopardy clause was designed to prohibit.

> "[T]his Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to *trial* for the same offense." *Abney v. U.S.*, 431 U.S. at 660-61.

This inconsistency makes certiorari even more appropriate.

2. THE QUESTION OF WHETHER A DEFENDANT TRIED ON INSUFFICIENT EVIDENCE MAY BE RETRIED IS "COLLATERAL" TO THE ISSUE OF GUILT, REGARDLESS WHETHER THAT FIRST TRIAL RESULTED IN GUILT, A HUNG JURY, OR A VERDICT OF NOT GUILTY.

The Government's sole point of substance in opposition to the petition for a writ of certiorari is that *Abney* does not apply to the case at hand because Petitioners' insufficiency argument is not a "collateral" issue subject to interlocutory review,[1] citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541.

However, *Abney* does not say that *some* double jeopardy claims meet the *Cohen* test but rather that *all* double jeopardy claims, by their "very nature", are "collateral"

1. This reasoning was also used by the court below. 632 F.2d at 1297.

matters for purposes of interlocutory review. 431 U.S. at 659 (see the Petition at p. 9).

> "[t]he very nature of a double jeopardy claim is such that it is collateral to, and separable from the principal issue at the accused's impending criminal trial." *Abney v. U.S.*, 431 U.S. 651, at p. 659 (1977).

As pointed out in the Petition (p. 8), once the Government has failed to put on a case, if they were allowed to present other evidence before another jury, the sufficiency of evidence adduced at the first trial would most assuredly be an issue collateral to the impending second trial.

What if the prosecution rested without calling a single witness and the jury deadlocks. Does the Government contend the double jeopardy clause would not preclude retrial?

Rule 29 of the Federal Rules of Criminal Procedure and the Due Process Clause impose a burden on the Government wholly separable from the jury verdict. That includes an obligation implicit in the double jeopardy clause requiring the prosecution to put on its case in the first instance so that an accused will not be forced "to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense". *Abney v. U.S., supra,* at p. 661.

One year after *Abney,* this Court handed down its decision in *Burks,* specifically overriding precedent and unequivocally holding that an insufficiency of the evidence at a first trial is a prior jeopardy. Clearly, after *Burks,* insufficiency in evidence removes "the very authority of the Government to hale (a defendant) into court

to again face trial on the charges against him." *Abney v. U.S.*, 431 U.S. at 659.

The question Petitioners wish to pose by interlocutory appeal is not whether they are guilty or innocent, or whether they could be convicted at a second trial, but whether the evidence presented at the first trial was sufficient to justify the submission to the jury.

It is precisely this argument, and the Third Circuit's reliance on *Burks*, that caused the Third Circuit to allow an interlocutory appeal of sufficiency after the Appellate Court had reversed a conviction for trial error. *U.S. v. United States Gypsum Co.* (3rd Cir. 1979) 600 F.2d 414.

3. THE RULING BELOW CONFLICTS WITH OTHER COURTS OF APPEALS.

Petitioners cited *U.S. v. United States Gypsum Co.*, (3rd Cir. 1979) 600 F.2d 414 and *U.S. v. Jelsma* (10th Cir. 1980) 630 F.2d 778 for the proposition that at least two circuits have allowed sufficiency appeals on double jeopardy grounds even though there had been no prior adjudication of insufficiency by judge or jury [Petition at pp. 9-10].

At p. 5, n. 2 of its memorandum in opposition, the Government suggests that these rulings can be reconciled with the decision below because those cases "followed closely in the wake of a remand from the court of appeals and after a final judgment in the district court", while the instant matter involves "the mistrial setting". However, that is a distinction without a difference for constitutional purposes. Both of those decisions were premised on the notion that the double jeopardy clause

requires appellate review of the evidentiary sufficiency of the first trial prior to retrial. It matters not, in terms of the two courts' constitutional reasoning, whether the first trial ended in a hung jury or in a conviction subsequently reversed for trial error. Therefore, the holdings of those circuits conflict with the court below.

Indeed, the present situation involving a mistrial is much closer to *Burks* constitutionally and factually than the situation in *Gypsum Co.* and *Jelsma* where the appellate court reversed for "trial error" and the defendants were faced with one more determination of the evidence's sufficiency [the jury's] than the Petitioners in the instant case, with no intervening appellate determination to the contrary. See *Burks,* 437 U.S. at pp. 14-15.

4. THE GOVERNMENT'S CONCERN WITH ECONOMY IS CONSTITUTIONALLY MISPLACED AND FACTUALLY INCORRECT.

At p. 5, n. 2 of its Memorandum, the Government echoes the concern of the court below that interlocutory review of cases such as this will lead to substantial delays and an avalanche of interlocutory appeals. *See* 632 F.2d at 1296. No proof is offered, and the Solicitor General assumes what is not the case in the Fifth Circuit: that the first trial's sufficiency will not be reviewed.

Such a balancing of equities or concern for economy have previously been rejected by this court in the face of constitutional rights grounded in the double jeopardy clause.

> "[W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be

> balanced, for the Clause has declared a Constitutional policy, based on grounds which are not open to judicial examination." *Burks v. U.S.*, 437 U.S. at 11, n. 6.

Statistically, few federal criminal trials end in hung juries. And here there is no issue of a waiver of continued jury deliberations, making this an even smaller class of cases.

As noted in the Petition (p. 11), interlocutory review of non-frivolous claims would enhance judicial economy rather burden the courts. Under the procedures announced by the Court below, two trials will be required, with the attendant costs in judicial time and expense of impaneling two juries and requiring the attendance of witnesses and the taking of testimony not once, but twice. Furthermore, the appellate court would still be required to review two records on appeal should the second trial result in a conviction. There is no savings; and there exists under this procedure the potential for an unnecessary jury trial in the event the subsequent appeal reveals the evidence at the first trial was insufficient.

Furthermore, Court of Appeals can follow this Court's guidance in *Abney* and weed out those frivolous double jeopardy claims through the familiar devices of summary calendars and procedures. *See* 431 U.S. at 662, n. 8. The Fifth Circuit has already established such a procedure in *U.S. v. Dunbar*, (5th Cir. 1980) 611 F.2d 985, *en banc*.

In short, if judicial economy is of concern, then since the burden of proof is on the Government, it should, by policy, be encouraged to put on its case the first occasion it is called upon to do so.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

GERALD H. GOLDSTEIN
GOLDSTEIN and GOLDSTEIN
29th Floor Tower Life Building
San Antonio, Texas 78205

Attorneys for Defendant,
BARRY MIROJNICK

EDWARD A. MALLETT
J. PATRICK WISEMAN
NELSON & MALLETT
3303 Main, Suite 300
Houston, Texas 77002

Attorneys for Defendant,
VINCENT DAMION

DANIEL R. MARLOWE
428 13th Street, #1000
Oakland, California 94612

Attorneys for Defendant,
MAJOR BECTON and
STANLEY BECTON

RICHARD THORNTON
600 U.S. National Bank Building
Galveston, Texas 77550

Attorneys for Defendant,
ROBERT POLLACK

ROBERT TURNER
DEBORAH GOTTLIEB
910 Houston Bar Center
Houston, Texas 77002

Attorneys for Defendant,
ROBERT JONES

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petitioners' Reply to Memorandum in Opposition to the United States Court of Appeals for the Fifth Circuit has been mailed to the United States Attorney for the Southern District of Texas and the Solicitor General, Washington, D.C., on this the _____ day of September, 1981.

GERALD H. GOLDSTEIN